LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 25 1966
CLERK

IN THE

Supreme Court of the United States

October Term, 1966
No. 797

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

JURISDICTIONAL STATEMENT.

RANDOLPH KARR,
ALAN L. FREEDMAN,
610 South Main Street,
Room 670,
Los Angeles, Calif. 90014,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	4
Questions Are Substantial	7
Conclusion	12

INDEX TO APPENDICES

Appendix A. Opinion of the District Court of Appeal	1
Appendix B. Los Angeles Municipal Code, Section 12.37	19
Appendix C. Memorandum of Decision	28

TABLE OF AUTHORITIES CITED

Cases	Page
American Ry Exp. Co. v. Levee, 263 U.S. 19	8
Andress v. Zoning Board of Adj. of Phil, 188 A. 2d 709	10, 11
Causby v. U.S., 328 U.S. 256	9
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182	7
Euclid v. Amber Realty Co., 272 U.S. 365	12
Exchange Nat. Bank v. Cook County, 6 Ill. 2d 419, 129 N.E. 2d 1, 51 A.L.R. 2d 312	10
Franco-Italian Packing Co. v. United States, 128 Fed. Supp. 408	9
Goldblatt v. Town of Hempstead, 369 U.S. 590	9
Griggs v. County of Allegheny, 369 U.S. 84	9
Grosso v. Board of Adj., 137 N.J.L. 630, 61 A. 2d 167	8
Hammerstein v. Superior Court, 341 U.S. 491	8
Indiana Toll Road Com. v. Jankovich, 193 N.E. 2d 237	9
Jamison v. State of Texas, 318 U.S. 413	2
Jankovich v. Indiana Toll Road Comm., 379 U.S. 487	9
King Mfg. Co. v. Augusta, 277 U.S. 100	2
Michigan-Wisconsin P. L. Co. v. Calvert, 347 U.S. 157	3, 8
Miller v. City of Beaver Falls, 368 Pa. 189, 82 A. 2d 34	9
Morris County Land Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A. 2d 232	9

Page

Panhandle v. Highway Commission, 294 U.S. 613 .. 12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 ....9, 11

Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799 10

Poulos v. New Hampshire, 345 U.S. 395 3

Raley v. Ohio, 360 U.S. 423 7

Rand v. City of New York, 155 N.Y.S. 2d 753 8

Robertson v. City of Salem, 191 Fed. Supp. 604 10

Roer Constr. Corp. v. City of New Rochelle, 136 N.Y.S. 2d 414 8

Sullivan v. Texas, 207 U.S. 416 8

Symonds v. Bucklin, 197 Fed. Supp. 682 11

United States v. Caltex, 344 U.S. 149 12

United States v. Central Eureka Mining Co., 357 U.S. 155 12

Zucht v. King, 260 U.S. 174 8

Statutes

California Code of Civil Procedure, Secs. 1060-1062-(a) 2

California Code of Civil Procedure, Secs. 1084-1097 2

Los Angeles Municipal Code, Sec. 12.37 .....3, 4, 5, 6

Los Angeles City Ordinance No. 120,796 3

United States Code, Title 28, Sec. 1257(2) 2, 8

United States Code, Title 28, Sec. 2101(c) 2

United States Constitution, Fourteenth Amendment 3, 6, 7, 8, 10, 12

Textbook

58 Columbia Law Review, pp. 650, 655, 666 10

IN THE

Supreme Court of the United States

October Term, 1966

No. .....

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the District Court of Appeal of the State of California, entered on May 6, 1966, affirming the trial court's ruling, and holding that an ordinance of the City of Los Angeles requiring compulsory dedication of land as a condition to the granting of a building permit does not violate the guarantees provided in the United States Constitution. A Petition for Hearing in the Supreme Court of the State of California was denied on June 29, 1966. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Superior Court of the State of California is not reported. The opinion of the District Court of Appeal of the State of California is reported in 51 Cal. Rptr. 197 (242 A.C.A. 21). The opinions of the Superior Court and District Court of Appeal of California are set forth in the Appendix.

JURISDICTION.

This suit was brought under the authority of Sections 1084-1097 of the Code of Civil Procedure of California for a writ of mandate directing the defendants to issue a building permit without requiring dedication of land and for declaratory relief under the authority of Sections 1060-1062(a) of the Code of Civil Procedure of California to declare the City ordinance involved unconstitutionally invalid. It was alleged that the City ordinance involved was repugnant to the Constitution of the United States and invalid. The Superior Court and District Court of Appeal of California decided the question in favor of the validity of the ordinance and the Appellate Court entered its judgment on May 6, 1966. A Petition for Rehearing was denied May 27, 1966 and a Petition for Hearing in the Supreme Court of the State of California was denied June 29, 1966. Notice of Appeal was filed on September 26, 1966 in the District Court of Appeal, State of California. Jurisdiction to review a decision by the highest court of a state in which a decision could be had by appeal is conferred on this court by 28 U.S.C. §§ 1257(2) and 2101(c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: *King Mfg. Co. v. Augusta,* 277 U.S. 100, 102-114 (1928); *Jamison v. State of Texas,* 318 U.S. 413, 414 (1943);

Poulos v. New Hampshire, 345 U.S. 395 (1952); *Michigan-Wisconsin P. L. Co. v. Calvert,* 347 U.S. 157, 159-160 (1953) (Defining highest court of a state where the state Supreme Court refuses to review the decision.)

STATUTE INVOLVED.

The statute in question is Section 12.37 of the Los Angeles Municipal Code, which was added by Ordinance No. 120,796 of the City of Los Angeles and became effective March 12, 1962. This ordinance as amended as of the filing of the within action on April 10, 1964 is set forth in the appendix.

QUESTIONS PRESENTED.

1. Whether the ordinance in question requiring compulsory dedication and improvement as a condition precedent to obtaining a building permit is a taking of private property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States or is a noncompensable taking under the police power.

2. Whether the ordinance in question denies the applicant for a building permit due process and equal protection of the laws;

(a) It is not imposed on all users of the public streets and ways, but is directed at abutting owners who request a building permit and does not apply to persons who obtain such a permit prior to its enactment or to persons who use public streets but by chance do not own property abutting such streets.

(b) It requires the applicant for a building permit to provide facilities made necessary not by the pro-

posed improvement but by the general growth of the community.

(c) It is arbitrary, confiscatory, unreasonable, and constitutes an improper delegation of legislative power.

(d) It makes no provision for uniformity or equal sharing of the cost of public improvements.

(e) It is a device to acquire private property for public street purposes under the guise of a zoning or building regulation.

STATEMENT OF THE CASE.

This action was brought by Appellant to compel the City of Los Angeles to issue to it a building permit without the requirement that Appellant dedicate to the City a portion of the property on which it seeks to build as required by Los Angeles Municipal Code, Section 12.37. The action was in form of a writ of mandate to compel issuance of the Permit, and declaratory relief to declare the ordinance unconstitutional.

By stipulation dated May 1, 1964, the parties agreed that the City would grant the above mentioned building permit upon the condition that, should the City prevail in upholding its Ordinance, the Southern Pacific Company would dedicate the required property.

The Appellant proposed to build a storage warehouse building on a parcel of property in the warehouse district just east of downtown Los Angeles. Said property is shown on Exhibit A attached to and made a part of Appellant's Complaint in the trial court. Upon submission of its plans for construction to the City, Appellant was notified it would have to dedicate 10 feet of its property for a distance of 850 feet abutting Alameda Street before a building permit would be issued;

although the area was zoned M-3 and would, except for Section 12.37, allow for the construction of the proposed building at said location. The condition requiring dedication of a parcel of land 850 feet by 10 feet along Alameda Street was imposed, even though the proposed building was to be built 260 feet from Alameda Street on the west side of the property and only 55 feet from Wilson Street on east and there was evidence that the closest and most convenient access from the property to the system of freeways in Los Angeles is to the east of said property over Wilson Street. Said dedication condition was imposed even though Alameda Street is a major arterial highway serving the entire city; even though there were no actual plans for the widening of Alameda Street in the area of the subject property; although there was evidence that traffic has actually decreased on Alameda Street from 46,900 vehicles per day in 1960 to 20,000 per day in 1963; even though there was evidence that widening of Alameda in this area was impractical due to about 50 substantial buildings built within the 10-foot proposed widening area; and even though the widening of Alameda Street, a major arterial highway, would only incidentally benefit the adjoining property owners, since such widening would primarily benefit the city and the many thousands of travellers who use this arterial street each day. Appellant appealed this requirement to the Board of Public Works of the City as required by Section 12.37; however, the dedication requirement was still made a condition precedent to the issue of the permit to build. Thereupon after exhaustion of administrative remedies, this action was instituted. Trial was had in the Superior Court of Los Angeles County for

the State of California and judgment was entered allowing the taking of Appellant's property without compensation from which appeal was taken. And after adverse decision of the California District Court of Appeal and denial of Petition for Rehearing and denial of a Petition for Hearing in the Supreme Court of California, this appeal was taken.

The Appellant contended at every stage of the proceedings that Section 12.37 was repugnant to the Fourteenth Amendment to the Constitution of the United States as a taking of private property for public use without just compensation or due process and a denial of equal protection of the laws. The constitutional questions were raised in the trial court in the Petition for Writ of Mandate and Complaint for Declaratory Relief and in the briefs and petitions filed at all stages of the proceedings. In the opinion of the California District Court of Appeal (reproduced in the appendix) the Court acknowledged that the constitutional issues were before it with the following language in the third paragraph of the opinion: ". . . . (T)he several contentions made by petitioner below and renewed on this appeal—that section 12.37 authorizes an unconstitutional taking of property without just compensation contrary to . . . . the Fifth and Fourteenth Amendments of the federal constitution, and accordingly, is not a noncompensable taking under the police power. Further constitutional objections to the ordinance assert that the requirement of a dedication as a condition precedent to a building permit violates the equal protection clauses of both state and federal constitutions, and that the ordinance is vague and uncertain and results in an unconstitutional delegation of legislative authority."

The constitutional objections, after consideration, were rejected by both the trial court and the California District Court of Appeal.[1]

QUESTIONS ARE SUBSTANTIAL.

This appeal presents important constitutional questions involving the right of local government entities to take private property for street widening purposes without providing for just compensation to the owner for the property taken in violation of the federal constitution. The novel ordinance adopted by the appellee municipality in question (as well as by other local governments) allows it to acquire such property, avoiding the usually required eminent domain proceedings, by requiring dedication of property abutting the street before it will issue a building permit to the owner so that he may utilize his land. The decision of the District Court of Appeal of California validating this ordinance carries obvious and far reaching implications. The provisions of the Fourteenth Amendment to the Constitution of the United States forbidding states from depriving any person of property without due process of law and guaranteeing each person equal protection of the laws appear to compel the conclusion that the ordinance in question is constitutionally invalid.

---

[1]"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1944); "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

This appeal clearly comes within the jurisdictional provisions relied upon, since as required by 28 U.S.C. §1257(2) there was drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision of the California District Court of Appeal was in favor of its validity. The cases cited herein in the section entitled, "Jurisdiction" holds that a municipal ordinance constitutes a state statute for the purposes of 28 U.S.C. §1257(2) (see also *Zucht v. King,* 260 U.S. 174, 176 (1922)). Since the Supreme Court of the State of California refused to hear the case, the decision of the District Court of Appeal of California was that of the highest court in which a decision could be had and its decision therefore is reviewable. *Michigan-Wisconsin P. L. Co. v. Calvert,* 347 U.S. 157, 159-160 (1953); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1950); *American Ry Exp. Co. v. Levee,* 263 U.S. 19, 20-21 (1923); *Sullivan v. Texas,* 207 U.S. 416 (1907).

The ordinance in question requiring compulsory dedication as a condition precedent to acquiring a building permit constitutes a taking of private property without due process in violation of the Fourteenth Amendment to the Constitution of the United States. Similar attempts by local entities to acquire private property for public street purposes without compensating the owner thereof have been held invalid, and it has been recognized that such action violates the Constitution of the United States. *Grosso v. Board of Adj.,* 137 N.J.L. 630, 633, 61 A. 2d 167, 169 (1948); *Rand v. City of New York,* 155 N.Y.S. 2d 753; *Roer Constr. Corp. v. City of New Rochelle,* 136 N.Y.S.

2d 414. Attempts to acquire private property for parks and other public uses by local entities without compensation have also been held invalid. *Miller v. City of Beaver Falls,* 368 Pa. 189, 82 A. 2d 34 (1951); *Morris County Land Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 193 A. 2d 232 (1963). Similarly, the taking, in effect, of air space rights without compensation have been held to be unconstitutional. *Indiana Toll Road Com. v. Jankovich,* 193 N.E. 2d 237 (1963), (*Jankovich v. Indiana Toll Road Comm.,* 379 U.S. 487, 493); *Griggs v. County of Allegheny,* 369 U.S. 84; *Causby v. U.S.,* 328 U.S. 256.

The case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 is particularly applicable to the instant case. The mere fact that a city may now need wider streets than it originally acquired is no justification for acquisition "by a shorter cut than the constitutional way of paying for the change." (260 U.S. 416).

There has been in the instant case a failure to follow the recognized distinction between a taking of property and a mere regulation. It is generally recognized that where, as in this case, the property of the owner is appropriated to a specific public use rather than merely restricted in its use in the hands of the owner. There is a constitutional taking (especially here where title is actually transferred to the public). *Indiana Toll Road Com. v. Jankovich,* 193 N.E. 2d 237, 241 (1963); (*Jankovich v. Indiana Toll Road Com.,* 379 U.S. 487); *Franco-Italian Packing Co. v. United States,* 128 Fed. Supp. 408, 414 (1955); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 593 (The court in referring to a valid exercise of the Police Power stated, "such legislation does not disturb the owner in the control or use of his property for lawful purposes . . .").

The decision validating the ordinance in question, if allowed to stand, would permit local public entities to require the owner to provide for facilities the need for which arises out of the total activity and growth of the community and not out of the proposed improvement. It has been recognized that this would violate the due process and equal protection clauses of the Fourteenth Amendment. *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E. 2d 799, 801; *Exchange Nat. Bank v. Cook County*, 6 Ill. 2d 419, 129 N.E. 2d 1, 51 A.L.R. 2d 312.

Another aspect of the serious constitutional questions raised by this ordinance is apparent from the fact that the ordinance imposes its burden not on all users of the public streets but only upon those owners who request a building permit to allow them to utilize their property in an otherwise lawful manner; nor does the ordinance apply to others in the locality who by chance do not own property abutting such public streets. In discussing the evils of such a practice, 58 Columbia L. R. 650, 655, 666, criticizes the use of such an ordinance under which "the accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare." And goes on to state that, "A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed . . ."

That the ordinance in question is a device to acquire private property for street use without compensation under the guise of a zoning ordinance is obvious. The use of the zoning powers for such uses has been held to be invalid. *Robertson v. City of Salem*, 191 Fed. Supp. 604 (D. Ore. 1960); *Andress v. Zon-*

ing Board of Adj. of Phil, 188 A. 2d 709 (1963); *Symonds v. Bucklin,* 197 Fed. Supp. 682, 685.

This decision, if allowed to stand, will have a nationwide effect and will encourage local entities to disregard eminent domain procedures and to try to acquire property for public streets without compensating the owner for the property taken. In California the use of such an ordinance, which started in the Appellee City of Los Angeles, has already spread to the County of Los Angeles and to numerous other areas throughout the state, and there is little doubt that many other local entities are awaiting the outcome of this case and will adopt similar ordinances if the Appellee City of Los Angeles is allowed to circumvent the law of eminent domain by the use of the ordinance in question. Along with depriving owners of their property without compensation, such an ordinance also conceals the costs of public improvements and does not allow for equal sharing of such costs.

The words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 416 (1922), appear to be directly in point: ". . . The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Citing Cases). When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears but that cannot be accomplished in this way under the Constitution of the United States . . ." The Appellee City has contended that the above statement is no longer applicable to zon-

ing regulations because of the later case of *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), validating comprehensive zoning regulations.

We submit that this principle should be restated and reaffirmed (within the framework of the zoning cases such as *Euclid v. Amber Realty Co.* (*supra*)), in order to inform local governmental agencies that the police power, broad and flexible as it may be, cannot be exercised with complete disregard for the constitutional protection afforded to private property and that local ordinances and laws must remain within the boundaries of the Federal Constitution. Authority for our position is found in the more recent case of *Panhandle v. Highway Commission*, 294 U.S. 613, 622.[2]

CONCLUSION.

For the reasons stated, it is submitted that the ordinance in question violates the Fourteenth Amendment and the questions presented by this appeal are substantial and of public importance. Therefore probable jurisdiction should be noted.

RANDOLPH KARR,
ALAN L. FREEDMAN,
Attorneys for Appellant.

---

[2]"The police power of a state, while not susceptible of definition with circumstantial precision must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." *Panhandle v. Highway Commission* (*supra*). See also dissent of Justices Black and Douglas in *United States v. Caltex*, 344 U.S. 149, 156 (1952) and dissent of Justice Black in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 179 (1958).

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Southern Pacific Company, a corporation, Petitioner and Appellant, vs. City of Los Angeles, a Municipal corporation, et al., Respondents. Civil No. 29462.

Filed May 6, 1966.

Appeal fom judgment of the Superior Court of Los Angeles County. Bernard S. Jefferson, Judge.

Randolph Karr and Alan L. Freedman for Appellant.

Roger Arnebergh, City Attorney, Bourke Jones and Claude E. Hilker, Assistant City Attorneys, for Respondent.

Southern Pacific Company, as the owner of certain property abutting on South Alameda Street in Los Angeles, applied for a permit to build a warehouse thereon. When the City refused to issue such permit unless compliance was had with section 12.37 of the Los Angeles Municipal Code, requiring petitioner to dedicate a portion of its property to the City for street widening purposes in accordance with its master plan of community development, Southern Pacific brought this mandamus proceeding to compel the issuance of such permit. The trial court having found against petitioner's claims that section 12.37 is unconstitutional on its face, and as applied to the facts at bar, petitioner has appealed.

With certain limited exceptions, section 12.37 provides, in essence, that no building or structure shall be

erected or enlarged upon any lot in an R3 or less restrictive zone (therefore including the M3 zone in which petitioner's property is located), if such lot abuts upon a major or secondary highway, unless the half of the highway adjacent to such lot has been dedicated and improved to its master planned width. The trial court found that the above section is part of the City's comprehensive zoning plan made necessary by an extensive population growth; that the existing street system within the City is materially deficient and inadequate, increasing with the population explosion and the accompanying increase in motor vehicle registration and building construction; that the provisions of section 12.37 benefit both petitioner's property and the public generally; that the conditions imposed by section 12.37 are neither arbitrary nor unreasonable; that section 12.37 does not deprive petitioner or others of the entire use or economic benefit of their property, contains reasonable classifications and provides adequate standards for its enforcement; that the warehouse in question will generate increased traffic on South Alameda and will further congest traffic by the addition of railway lines to service the same; and that the required dedication will not cause petitioner undue hardship or financial loss.

The foregoing findings are opposed, generally and specifically, to the several contentions made by petitioner below and renewed on this appeal—that section 12.37 authorizes an unconstitutional taking of property without just compensation contrary to Article I, Sections 1 and 16 of the California Constitution and the Fifth and Fourteenth Amendments of the federal constitution, and accordingly, is not a noncompensable taking under the police power. Further constitutional objections to

the ordinance assert that the requirement of a dedication as a condition precedent to a building permit violates the equal protection clauses of both state and federal constitutions, and that the ordinance is vague and uncertain and results in an unconstitutional delegation of legislative authority.

Section 12.37 is assertedly a zoning ordinance, appearing under an article of the municipal code entitled "The Comprehensive Zoning Plan of the City of Los Angeles." It is contended by appellant that "A zoning ordinance may not be used as a device to take property for public use without the payment of compensation." (*Kissinger v. City of Los Angeles,* 161 Cal.App.2d 454, 462), such action being contrary to the protection guaranteed by the federal and state constitutions in that regard. To such contention respondents reply that the dedication or taking under the subject ordinance is a form of "police power acquisition" as contrasted to acquisition by eminent omain. In *Ayres v. City Council of Los Angeles,* 34 Cal.2d 31, where the court upheld the validity of conditions to the approval of a subdivision that the subdivider dedicate part of the land for street purposes, there was an approving reference to cases from other jurisdictions "where the distinction was made between the exercise of authority in such proceedings and the exercise of the power of eminent domain. In each of those cases it was held that the requirement for the dedication of land to the widening of existing streets was not a compulsory taking for public use; but that where it is a condition reasonably related to increased traffic and other needs of the proposed subdivision it is voluntary in theory and not contrary to constitutional concepts." (p. 42.) In other de-

cisions involving land development, though not pertaining to subdivisions as such, the courts have recognized that dedication can be required under the police power as a condition thereto. (*Bringle v. Board of Supervisors,* 54 Cal.2d 86; *Mitchell v. Morris,* 94 Cal.App.2d 446.) Concededly, no appellate decision has been rendered in this state passing directly upon the factual situation at bar. By analogy, however, both sides claim that *Ayres* and *Bringle* favor their respective positions.

It is urged by appellant that *Ayres* and *Bringle* should be limited to the circumstances there presented. In *Bringle,* it is pointed out, the petitioner was asking for a zone variance, the granting of which lay largely in the discretion of the body empowered to issue the same. In *Ayres,* the dedication was a proper condition imposed on the subdivider; since he sought to acquire the advantages of lot subdivision, the court properly held that there rested with him the duty of complying with reasonable conditions for its improvement, including reasonable access by the purchasers of lots to the property purchased. Here, however, the property is already zoned for the proposed use; having met the requirements for the issuance of a building permit, appellant claims it is entitled to such permit as a matter of law. (*McCombs v. Larson,* 176 Cal.App.2d 105.) Too, any benefit resulting from the widening of Alameda Street (as here proposed) would inure to the benefit of the public generally and not so much to appellant or other land owners specifically. Stated otherwise, since the general growth of the community has made necessary the condition (of dedication) provided by the ordinance, the improvement should be borne by the community and not by the individual land owner.

In light of the above, appellant argues that broad language appearing in landmark zoning cases which emphasize the flexibility of police power should not be applied to ordinances such as the one before us. For example, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [47 S.Ct. 114, 71 L.Ed. 303], it is declared: "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobile and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." (p. 387.) Likewise, in *Miller v. Board of Public Works*, 195 Cal. 477: "Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'" (p. 485.) More recently, in 1962, both of the above passages were quoted with approval in *Consolidated Rock*

Products Co. v. City of Los Angeles, 57 Cal.2d 515, 521-522.

But in *Consolidated Rock* the court made use of language, less broad than hereinabove referred to, with which to indicate its approval of comprehensive zoning legislation, specifically its value for the promotion of the material welfare of a people. The *Pennsylvania Coal* case (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 [43 S.Ct. 158, 67 L.Ed. 322]) decided in 1922 and relied on here by appellant, was distinguished and held inapplicable to such legislative enactments: "It was decided before the principles of comprehensive zoning were established . . ." (p. 528.) Earlier in its opinion the court pointed out that "When the Supreme Court of the United States in 1926 set its seal of approval upon the constitutionality of this then new type of legislation in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 [47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016], the cycle was completed, and comprehensive zoning in the short space of ten years had taken its place as a constitutionally recognized part of our legal and political system. We indulge in this bit of legal history because, as will appear, plaintiffs place their principal reliance upon language first found in cases decided long before the principle of comprehensive zoning was anywhere applied in this country or its constitutionality established." (p. 521.) The court then went on to state that "As a corollary to this recognized principle of the capacity of the police power to meet the reasonable current equirements of time and place and period in history is the equally well settled rule that the determination of the necessity and form of such regulations, as is true with all exercises of the police power, pri-

marily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" (p. 522.)

In section 12.02 of the Municipal Code the purpose of the subject comprehensive zoning plan is declared in pertinent part as follows: "The purpose of this Article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan in order to designate, regulate and restrict the location and use of buildings, structures and land, for agriculture, residence, commerce, trade, industry or other purposes; to regulate and limit the height, number of stories, and size of buildings and other structures, hereafter erected or altered . . . Further, such regulations are deemed necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property . . . . to prevent undue concentration of population; to lessen congestion on streets; to facilitate adequate provisions for community utilities and facilities such as transportation . . . and other public requirements; and to promote health, safety, and the general welfare, all in accordance with a comprehensive plan." Implementing the purpose of the overall plan, as above declared, are numerous specific requirements regulating the use of private property; included thereunder are provisions for off-street automobile parking and access driveways. Also included (§§ 11.50 et seq.) are provisions regulating certain subdivisions under local control delegated to municipalities by the Subdivision

Map Act (Bus. & Prof. Code, §§ 11500, et seq.) and securing street dedications pursuant thereto.

We are of the view that there is validity to respondents' argument that since the courts have recognized that the Legislature may properly insist upon dedication of the means of access—and that, of necessity, implies sufficient access—both in subdivision and non-subdivision cases, a flexible police power may require the dedication of additional access, under the circumstances here, when the need therefor arises. Thus, in *Bringle* (a non-subdivision case) the court noted that conditions may be attached to the granting of a variance in order to preserve "the general purposes and intent of the zoning ordinance." In our case, as shown above, one of the purposes of the comprehensive zoning ordinance is "to lessen congestion on streets . . . to facilitate adequate provisions for community utilities and facilities such as transportation." Continuing, "One of the general purposes is to provide for adequate streets and highways, and a street that might be adequate for the needs of an agricultural area might be inadequate if part of the area is to be used for another purpose." Mention is then made of *Ayres*; it is described as "*an analogous situation*" where the court "held that a city may require the dedication of land for the widening of an existing street as a condition to its approval of a subdivision map and that such a condition to its approval of a subdivision map and that such a condition, where reasonably related to the *increased traffic* and other needs of the proposed subdivision, does not constitute a taking of private property without compensation." (Emphasis added.) (54 Cal.2d 86, 88-89.) In this latter connection the court pointed out that

Bringle, the land owner, made no showing as to the effect on traffic conditions of the use of his excavating business or that the need for widening the street was not related to the proposed use of the street, nor to any master plan of the county. The court's reference to the county's "master plan" is particularly significant because in *Ayres* if determined that the required dedication for street widening purposes was proper since it related not only to the general welfare of the lot owners but also "of the public." (34 Cal.2d 31, 42.) In the present case, of course, the trial court was benefited by the receipt in evidence of the comprehensive zoning ordinance as well as by expert testimony of the beneficial impact on the area, traffic-wise, by the subject legislation.

Recapitulating, if *Bringle* is analogous to *Ayres,* then the present proceeding is analogous to both those cases under the process of reasoning adopted by our Supreme Court to establish such analogy. In *Wine v. Council of City of Los Angeles,* 177 Cal.App.2d 157, cited by appellant, the problem was not quite the same as ours; we have also noted the criticism of *Bringle* in 13 Hastings L.J. 401, but it still governs here, such criticism notwithstanding. Numerous authorities, state and federal have also been cited by each side. It will suffice to observe that they reflect the continuing conflict between the public interest manifested through the exercise of the police power on the one hand, and on the other hand, the property interest of the land owner which is disclosed through the exercise of eminent domain. As pointed out in *Bacich v. Board of Control,* 23 Cal.2d 343, 351: "In some degree those opposed policies are manifested in the conflict between the constitutional

mandate that compensation be paid when private property is taken . . . for a public purpose and the exercise of police power where compensation need not be paid. The line between those two concepts is far from clearly marked." Each case, of course, must stand or fall on its own particular facts; and in our view the decision in *Ayres* is still another application of the principle that the exercise of the police power in traffic regulation cases "is simply a risk the property owner assumes when he lives in modern society under modern traffic conditions" (*People v. Avon,* 54 Cal.2d 217, 224)—and particularly if he lives in the metropolitan area of Los Angeles.

Our conclusion that the ordinance is not unconstitutional on its face finds further support in light of the fact that it is appellant, not respondents, who wishes to put its property to the use now contemplated notwithstanding the increase in traffic which will be generated thereby. If it desires the benefits resulting from the improvement or change in the character of the land, it must meet any reasonable condition imposed by respondents before the issuance of a building permit—such undoubtedly is the holding in *Ayres,* which case is cited with approval by the New York Court of Appeals as another instance where compliance with pertinent local ordinances has been sustained as a valid exercise of the police power. (*Brous v. Smith,* 106 N.E.2d 503, 304 N.Y. 164.) Said the New York court: "Of course, no one may question that the town, were it desirous of constructing a road across petitioner's property, would have to condemn the necessary land and compensate petitioner. But the town here has no such desire or design and does not seek to condemn land owned by

petitioner. It is petitioner who wishes to construct dwellings on his property, and the town merely conditions its approval of such construction upon his compliance with reasonable conditions designed for the protection both of the ultimate purchasers of the homes and of the public. That the state may empower the town to do this, is clear '* * * the subjection to the police power of all property gives the state the right to forbid the use of property in the way desired save under reasonable conditions, promoting the public welfare * * *.'" (106 N.E.2d 503, 506-507.) To the same general effect is *City of Buena Park v. Boyar,* 186 Cal.App.2d 61, where the court sustained the imposition of a condition on a subdivider to pay $50,000 to help in the construction of a drainage ditch which would serve the needs not only of the lot owners but also those of the city generally. Citing *Ayres,* the court declared that "the subdividing of land is a privilege to which the Legislature has attached certain conditions." (p. 67.) Again, although appellant insists otherwise, we perceive no rational distinction between the "privilege" conditionally accorded subdividers and that reflected by appellant's desire to improve its property under the circumstances here present.

Appellant nonetheless points out that police regulations may validly be imposed only "if they constitute a reasonable exertion of governmental authority for the public good." (*State Board v. Thrift-D-Lux Cleaners,* 40 Cal.2d 436, 440.) Since it is also held in the above case that "Whether there has been a reasonable exercise of the power is a court question" (p. 440), we are called upon to determine whether, under the record before us, there exists any necessity for the en-

actment of the ordinance. Although the reasonableness of a legislative enactment is a court question, at this stage of the proceedings the determination below must be sustained if the necessity and propriety of the legislative action is one upon which reasonable minds may differ. (*Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515, 532.) Governed by such rule, and upon an examination of the evidence presented, we have no hesitancy in finding that all the relevant circumstances justified the legislation here challenged. Competent testimony established that the tremendous population and industrial growth of Los Angeles has been accompanied by an even greater increase in the number of vehicles used with resulting highway deficiencies and congestion. A master plan is essential to guide the growth of the city. Such plan presently calls for major highways of 100 feet and major roadways of 80 feet, while secondary highways and roadways will approximate 86 feet and 66 feet, respectively. At the time of trial the city was attempting to effectuate its master plan through voluntary dedications,[1] automobile gas tax funds and section 12.37, the subject ordinance. There was also testimony that because of lack of public funds, if eminent domain represented the only means available to obtain street widening for existing streets, it would take more than 100 years to achieve the desired goals. Property along major and secondary highways is usually zoned for intensive uses such as multiple dwellings, industry and commerce. Freeway openings normally provide only temporary reductions on ad-

[1]The City had then received some 1104 voluntary dedications, because an increase in land is assertedly realized by property abutting upon a fully dedicated highway with greater accessibility.

jacent surface streets. While the central city area of Los Angeles is being aided by reason of the greater accessibility provided by freeways, the failure to correct the inadequate surface street system will adversely effect that area's redevelopment. Still other considerations could be mentioned to establish the necessity of section 12.37 or some similar measure to combat and improve the situation depicted above. We pass, therefore, to a determination as to whether the legislation can be constitutionally applied to this appelllant.

There was evidence that appellant's proposed warehouse would occupy approximately 3½ acres of land and over 5 acres of floor area. Twenty railroad cars and forty-eight trucks could be accommodated at a single time and could be operated, if desired, by tenants on a 24-hour basis. If so used, more than 1000 trucks would be utilized each day. The site of the warehouse is located in the city's major produce terminal—other goods and merchandise delivered to that point are distributed throughout the city by truck. The intersection of 8th and Alameda Streets is now over capacity and will be even more so by 1980, at which time the traffic count will have increased to approximately 50,000 vehicles per day. The progress of traffic is always slowed by the entry of trucks into the traffic flow—being further affected in that regard by the operation of appellant's railroad lines. Access to Alameda Street is essential to appellant's operation, Alameda being a major north-south truck traffic route second in use only to the Harbor Freeway. At the time of trial six dedications along Alameda had been offered pursuant to section 12.37: while portions of that street already met the width contemplated under the master plan, the re-

mainder of Alameda within the freeway loop should meet the master planned width within the next two to five years. Even a widening of only one block will have a beneficial effect on the overall traffic flow. Too, as noted in footnote, 1, *supra,* as a general proposition the increased accessibility of the property increases the value of the property. Although the burden lay with appellant to show that the ordinance is invalid in its application to appellant's property, one would have expected some showing that it should be expected from the general proposition just mentioned. In the absence thereof, the trial court properly determined that the proposed dedication of a small portion of appellant's land, less than 1/5 of an acre from a parcel of some 50 acres, would work no undue hardship but, to the contrary, would be of benefit not only to appellant's operations but also to the value of its land. We are satisfied that appellant has presented no valid argument which militates against the enforcement of the subject ordinance.

There is no merit to the further claim that the ordinance is constitutionally objectionable because it violates the equal protection clause of the federal and state constitutions. According to appellant, the subject ordinance does not require property owners in an R-2 or more restrictive zone to dedicate a portion of their land should they desire to erect a duplex or a certain type of office; accordingly, they rely on *People v. Western Fruit-Growers,* 22 Cal.2d 494, which declares that a law "is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the

subject of the law." (p. 506.) But owners in an R-3 or less restrictive zone (where appellant's property is located) do not stand in precisely the same relation to the law as do owners in R-2 zones. A new single family dwelling or duplex in an R-2 district does not generate the increase in traffic that would be the result if a new apartment building or a warehouse (such as appellant proposes to build) were erected in an R-3 area; consequently appellant and others so situated stand to receive much more benefit if a street in their area is widened by resort to the present ordinance. Appellant also poses certain hypothetical situations which assertedly offend against the equal protection clause. Even if such claims might possibly be valid, which they are not, "The situations conjured up by [appellant] are not here involved, and [appellant] is limited in his attack to the application of the statute to the factual situation now before the court." (*Wholesale T. Dealers v. National etc. Co.,* 11 Cal.2d 634, 661.) Appellant, however, does urge an additional point which should be answered; citing *City of Los Angeles v. Offner,* 55 Cal.2d 103, it is contended that the present ordinance results in unequal taxation. *Offner* holds that a city ordinance setting up a special sewer assessment is invalid where the costs assessed exceeded the cost of the improvement within the district; from this appellant argues that owners of land abutting streets and who desire to improve their property are specially taxed by the ordinance's dedication requirement which inures to the benefit of the general public. In *Offner,* however, it does not appear that the court was called upon to determine, as we have had to do, the taking of land without compensation for the particular needs in question; it was strictly a sewer assessment proceeding and

should be so limited. Too, the court in *Offner* was not confronted with the type of argument, rejected in *Ayres,* that the land owner should not be required to bear a financial loss for the sake of the city; as pointed out in *Ayres,* each additional subdivision adds to the traffic burden, and the fact that the street widening dedication would incidentally benefit the city as a whole is an irrelevant consideration.

Appellant's final constitutional objection to the ordinance is that it is vague and uncertain; accordingly, since no sufficient standards are prescribed to guide the administrative officer charged with its enforcement, the result is an unlawful delegation of legislative authority. (*Agnew v. City of Culver City,* 147 Cal.App.2d 144, 153-154.) Specifically, appellant argues that no concrete standard is furnished for the granting of variance from the requirement of dedication, the only guideline being compliance with the "spirit and intent" of the act. A Texas case (*Texas Consol. Theatres v. Pittillo,* 204 S.W.2d 396) holds that such language is too vague to constitute a proper guideline; but, as pointed out in *New York ex rel. Lieberman v. Van De Carr,* 199 U.S. 552, the practicability of a given situation has some bearing in the determination of how much discretion may be lawfully delegated to an administrative officer. Thus, the ordinance upheld in *Bringle* involved a delegation to authority to "impose such conditions on the issuance of the permit as it determines proper to provide for the maintenance of the integrity and character of the neighborhood and the general purpose and intent of the ordinance." (54 Cal.2d 86, 88.) Too, as in *Mitchell v. Morris,* 94 Cal.App.2d 446, 449, a sufficient standard can also here be found by reference to

the comprehensive zoning plan considered in its entirety and with due "regard to the complexity of situations that could arise." As further stated in *Mitchell,* "discretion is vested in the planning commission, but it is not an uncontrolled and unguided discretion, even though it may call for the exercise of 'judgment of high order.'" (p. 449.) The present ordinance calls for an awareness by the administrative officers of "practical difficulties" and the avoidance of "unnecessary hardship" in the consideration of a variance from the dedication requirement. While this may call for "judgment of a high order," such guidelines are not so vague as to be constitutionally objectionable.

Appellant's final complaint is that certain findings of the trial court are not supported by the evidence; it also asserts that certain findings requested by appellant should have been made. Although some 60 pages of appellant's opening brief are devoted to the several points previously discussed, this final contention consumes only six pages of that brief—and there is no further reference to the matter in appellant's reply brief. It seems rather clear, and we are of the view, that appellant is simply rearguing evidentiary matters, which our previous recital establishes, the sufficiently sustained under the record here. For example, appellant challenges Finding XIV that the required dedication "would not cause any undue hardship or financial loss" to appellant; as shown earlier, that phase of the case is simply not as contended for by appellant. Appellant had the burden below of establishing its claims that the ordinance is invalid on its face and in its application to appellant; it did not meet that burden. On appeal, it also had the burden of establishing that the challenged

findings are without substantial support; it has not met that burden.

For the foregoing reasons, the judgment is affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Fourt, *J.*

APPENDIX B.

The Los Angeles Municipal Code Ordinance in question on the date of filing of the action herein as set forth in the findings [C. T. pp. 29-37], provides as follows:

"Sec. 12.37. HIGHWAY DEDICATION AND IMPROVEMENT.

"A. *Requirement.* No building or structure shall be erected or enlarged, and no building permit shall be issued therefor, on any lot in any R3 or less restrictive zone (as such order of restrictiveness is set forth in Subsection B of Section 12.23), if such lot abuts a major or secondary highway, unless the one-half of the highway which is located on the same side of the center of the highway as such lot has been dedicated and improved for the full width of the lot so as to meet the standards for such highway provided in Subsection H of this section, or such dedication and improvement has been assured to the satisfaction of the Bureau of Right of Way and Land and the City Engineer, respectively. As used in this section, the center of the highway shall mean the centers of those highways as such highways are shown on the Master Plan of Highways and Freeways approved by the City Council and on file in the office of the Department of City Planning.

"1. The maximum area of land required to be so dedicated shall not exceed 25% of the area of any such lot which was of record on March 1, 1962, in the Los Angeles County Recorder's Office. In no event shall such dedication reduce the

lot below a width of 50 feet or an area of 5000 square feet.

"2. No such dedication shall be required with respect to those portions of such a lot occupied by a main building which was existing on March 1, 1962.

"3. No additional improvements shall be required on such a lot where complete roadway, curb, gutter and widewalk improvements exist within the present dedication contiguous thereto.

"4. No building or structure shall be erected on any such lot after March 1, 1962, within the dedication required by Subsection H of this section.

"B. *Exceptions.* The provisions of Subsection A of this section shall not apply to the following construction:

"1. One single-family dwelling with customary accessory buildings when erected on a vacant lot.

"2. Additions and accessory buildings incidental to a residential building legally existing on the lot, provided no additional dwelling units or guest rooms are created.

"3. Additions and accessory buildings incidental to other than a residential building existing on the lot on March 1, 1962, provided that the total cumulative floor area of all such additions and accessory buildings shall not exceed 200 square feet.

"C. *Dedication Procedure.*

"1. Any person required to dedicate land by the provisions of this section shall make an offer to dedicate properly executed by all parties of inter-

est including beneficiaries and trustees in deeds of trust as shown by a current preliminary title report prepared by a Title Company approved by the Bureau of Right of Way and Land for that purpose. Such report shall be furnished by the applicant. Such offer shall be on a form approved by the City Attorney and the Director of the Bureau of Right of Way and Land; be in such terms as to be binding on the owner, his heirs, assigns or successors in interest; and shall continue until the City Council accepts or rejects such offer or until one year from the date such offer is filed with the Bureau of Right of Way and Land for processing, whichever occurs first. The offer shall provide that the dedication will be complete upon acceptance by the City Council. The offer shall be recorded by the Bureau of Right of Way and Land in the Office of the County Recorder of Los Angeles County upon its acceptance by its Director. The Director shall accept or reject the offer for recordation within 10 days after it is filed with the Bureau. The offer shall thereafter be promptly processed by the City Departments concerned and submitted to the City Council, in order to complete the dedication within one year. If the offer is rejected by the City Council or not processed within one year, the Bureau of Right of Way and Land shall issue a release from such offer which shall be recorded in the Office of the County Recorder unless the parties making the offer wish to have the time extended.

"2. For purposes of this section, dedication shall be considered as satisfactorily assured when

the Bureau of Right of Way and Land accepts for recordation the offer to dedicate provided for herein. When said Bureau accepts the offer to dedicate it shall notify the Department of Building and Safety and the City Engineer thereof.

"D. *Improvement Procedure.*

"1. Any person required to make improvements by the provisions of this section shall either make and complete the same to the satisfaction of the City Engineer or shall file with the City Engineer a bond in such an amount as the City Engineer shall estimate and determine to be necessary to complete all of the improvements required.

"2. Such bond may be either a cash bond or a bond executed by a company authorized to act as a surety in this State. The bond shall be payable to the City and be conditioned upon the faithful performance of any and all work required to be done, and that should such work not be done or completed within the time specified, the City may at its option, cause the same to be done or completed, and the parties executing the bond shall be firmly bound under a continuing obligation for the payment of all necessary costs and expenses incurred in the construction thereof. The bond shall be executed by the owner of the lot as principal, and if a surety bond, shall be executed by a corporation authorized to act as a surety, under the laws of the State of California.

"3. Whenever the owner elects to deposit a cash bond, the City is authorized, in the event of any default on his part, to use any or all of the deposit money to cause all of the required work to

be done or completed, and for payment of all costs and expenses therefor. Any money remaining shall be refunded to the owner.

"4. When a substantial portion of the required improvement has been completed to the satisfaction of the City Engineer and the completion of the remaining improvements is delayed due to conditions beyond the owner's control, the City Engineer may accept the completed portion and consent to a proportionate reduction of the surety bond in an amount estimated and determined by the City Engineer to be adequate to assure the completion of the required improvements remaining to be made.

"5. Whenever a surety bond has been filed in compliance with this section, the City is authorized, in the event of any default on the part of the principal, to enforce collection, under such bond, for any and all damages sustained by the City by reason of any failure on the part of the principal faithfully and properly to do or complete the required improvements, and in addition may cause all of the required work to be done or completed, and the surety upon the bond shall be firmly bound for the payment of all necessary costs thereof.

"6. The term of the bond shall begin on the date of the deposit of cash or the filing of the surety bond, and shall end upon the date of the completion to the satisfaction of the City Engineer of all improvements required to be made. The fact of such completion shall be endorsed by a statement thereof signed by the City Engineer, and the de-

posit shall be returned to the onwer, or the surety bond may be exonerated at any time thereafter.

"7. For purposes of this section, improvement shall be considered as satisfactorily assured when the City Engineer accepts the cash or surety bond provided for herein or the improvements required to be made have been completed to his satisfaction. When the City Engineer accepts the bond or the work has been completed to his satisfaction he shall notify the Department of Building and Safety thereof.

"E. *Issuance of Building Permits After Certification of Dedication and Improvement.* When all dedication and improvements required by this section have been completed or satisfactorily assured a building permit may be issued.

"F. *Fees Waived.* Notwithstanding any other provisions of this Code to the contrary, no fee shall be charged for the rendering of any service by the City in connection with any dedication or improvement required by the provisions of this section and not a part of a subdivision proceeding.

"G. *Lots Affected by Street Widening.* On a lot which is affected by street widening required by the provisions of this section, all required yards, setbacks, parking area, loading space and building locations for new buildings or structures or additions to buildings or structures shall be measured and calculated from the new lot lines being created by said widening; provided, however, that for the purpose of establishing the required front yard depth on a frontage where the ultimate street line

has been determined under the provisions this section, the depths of all existing front yards may be measured from such ultimate street line instead of the front lot line.

In applying all other provisions of this Article, the area of such lot shall be considered as that which existed immediately prior to such required street widening.

"H. *Improvement Standards.*

"1. All major and secondary highways shall be constructed and improved in accordance with the following standards insofar as such is practical and will not create an undue hardship.

"(a) Major Highways shall be dedicated to a width of 100 feet, with 80 feet of roadway and 20 feet of sidewalk, including parkway. Each one half of said highway shall consist of 40 feet of paved roadway, curbs and gutters, and 10 feet of sidewalk and parkway, with at least five feet thereof paved.

Where Major Highways are divided by a dividing strip the width of the dividing strip shall not be considered a part of the highway for the purpose of calculating either the width of the dedication or the width of the improvement required by this section.

"(b) Secondary Highways shall be dedicated to a width of 86 feet, with 66 feet of roadway and 20 feet of sidewalk, including parkway. Each one half of said highway shall consist of 33 feet of paved roadway, curbs and gutters, and 10 feet of sidewalk and parkway, with at least 5 feet thereof paved.

"2. All improvements required to be made by the provisions of this subsection shall be done in accordance with the applicable provisions of Department of Public Works Standard Specifications No. 158, adopted by the City Council on May 7, 1958, and amended September 19, 1960.

"3. The City Engineer may approve and allow such variations and deviations from the aforesaid requirements as he determines are made necessary by the conditions of the terrain and the existing improvements contiguous to the property involved.

"I. *Appeal.*

"1. Any person may appeal any determination of the City Engineer made in connection with the administration and enforcement of the improvement provisions of this section to the Board of Public Works.

"2. The Board of Public Works may make slight modifications in the requirements of this section or the determinations of the City Engineer thereunder as the Board shall determine are required in order to prevent any undue hardship under the facts of each individual case. However, no such modification shall be granted unless it is in conformity with the spirit and intent of this section.

"J. *City May Share the Cost of Making Unusual Improvements.* Upon proper application to the City Council and upon recommendation of the City Engineer, the City may accept and provide for contribution toward the cost of making any improvement required by the provisions of this sec-

tion which the City Engineer determines will cost an amount greatly in excess of the cost to other property owners who are required to make improvements under the provisions of this section in the immediate vicinity of the said improvement.

"K. *City Engineer to Determine Street Alignment.* Whenever uncertainty exists as to the proper application of the provisions of this section in the matter of street alignment, the City Engineer shall determine their application in conformity with the spirit and intent of this section."

APPENDIX C.

Memorandum of Decision.

Superior Court of the State of California, for the County of Los Angeles.

Southern Pacific Company, a corporation, Petitioner, vs. City of Los Angeles, a municipal corporation, et al., Respondents. No. 836702.

This is a mandate proceeding brought by Southern Pacific Company, a corporation, as petitioner, against the City of Los Angeles, a municipal corporation, and various city officials as respondents. Petitioner seeks to have declared unconstitutional Section 12.37 of the Los Angeles Municipal Code, which was added by Ordinance No. 120,796 and became effective March 12, 1962.

Section 12.37 provides that no building or structure shall be erected or enlarged and no building permit shall be issued therefor on any lot in any R-3 or less restrictive zone, if such lot abuts on a major or secondary highway which is not widened to the standards set forth for such major or secondary highways. Provisions are made for the granting of such a building permit if the owner is willing to dedicate to the city, for street widening purposes, the amount of land needed for the highway to meet the width standards set forth in other sections of the Municipal Code.

Petitioner owns real property abutting on South Alameda Street in Los Angeles between 7th and 8th Streets, which is zoned M-3. Alameda Street is designated as a major highway under the master plan of highways and freeways and requires a dedicated width of 100 feet. At the point where petitioner's prop-

erty abuts upon Alameda Street, the street is not the required 100 feet in width. Petitioner applied for a building permit to erect a warehouse type of building on its property. As a condition precedent to the issuance of a building permit, petitioner was required to dedicate a portion of its property to the city for street widening purposes. The portion to be dedicated would be a strip 10 feet in depth and 850 feet in length. Petitioner alleges that the portion of its property required to be dedicated for street widening purposes has an approximate value of $23,375.00.

Petitioner contends that Section 12.37 of the Los Angeles Municipal Code is unconstitutional on its face and also as applied to petitioner. Petitioner contends that the section is unconstitutional as violating the due process, eminent domain and equal protection provisions of the California and United States Constitutions. It is petitioner's basic contention that Section 12.37 constitutes a taking of petitioner's property which requires compensation within the meaning of the law of eminent domain, and that the section is simply disguised in form as a zoning regulation enacted pursuant to the police power of the city.

Respondents, on the other hand, urge that Section 12.37 of the Los Angeles Municipal Code is not a taking of property within the meaning of the eminent domain provisions of the Constitution, but is an appropriate exercise of the police power as a part of the city's over-all master plan of community development, with special reference to the master plan of comprehensive zoning and highway development.

In passing upon the question of the validity or invalidity of legislation, including city ordinances, we are

guided by certain well-settled principles. One is that a presumption exists in favor of constitutionality and hence the invalidity of legislation must be clear before such legislation can be declared unconstitutional. It is not the court's function or authority to weigh and consider the social or economic desirability of the ordinance or to question the wisdom of the legislative body which enacted the ordinance. These are matters solely for legislative determination. Debatable questions as to reasonableness are not for the courts but for the legislative branch of government. (*Sproles vs. Binford,* 286 U.S. 388.) The presumption of reasonableness being with the enacting legislative body, the burden of showing unreasonableness rests upon the property owner. (*Bibbs vs. Navajo Freight Lines, Inc.,* 359 U.S. 529.) Another guiding principle is that legislation is to be so construed, if the language permits, as to render it valid and constitutional rather than invalid and unconstitutional. (*Erlich vs. Municipal Court,* 55 Cal. 2d 553.)

The basic question to be decided in the case at bench is whether or not the section of the Los Angeles Municipal Code involved is an exercise of governmental police power or a taking of property which requires compensation as an exercise of the right of eminent domain. The form which the legislation takes is certainly not determinative of whether the governmental action constitutes a *taking* of property under the right of eminent domain or an exercise of the police power of the city. There are no decided cases which are definitive of the issue before the court. Governmental action may restrict an owner's dominion over and use of his property and lessen its value without being con-

sidered a taking of private property for a public use requiring compensation to the owner. Zoning legislation and legislation requiring land dedication for street widening purposes from land subdividers are examples of this kind of valid legislation.

The validity of comprehensive zoning legislation was upheld by the United States Supreme Court in *Euclid vs. Amber Realty Co., 272* U.S. 365. There the court rejected the contention that comprehensive zoning deprived the property owner of his property without due process of law and contrary to the equal protection of the laws under the Fourteenth Amendment. *Euclid* made clear that before a court may declare such an ordinance unconstitutional, the court must be able to say that the provisions are clearly arbitrary or unreasonable and have no substantial relation to the public health, safety, morals or general welfare, which are the established police power goals.

In *Clemons vs. City of Los Angeles,* 36 Cal. 2d 95, a city ordinance was upheld which prohibited the reduction of any lot below 50 feet in width and 5000 square feet in area and prevented the owner of a bungalow court of 9 units from dividing the units and selling each individually with a width of only 25 feet and averaging 925 square feet in area. In *Clemons* the State Supreme Court reiterated its view of the validity of zoning ordinances as a part of a city's comprehensive and systematic plan of community development, when reasonable in object and not arbitrary in operation. In *Clemons* the court also reiterates its position taken in *Miller vs. Board of Public Works,* 195 Cal. 477, that even though the court may differ with the zoning authorities as to the necessity

or propriety of an enactment, so long as it remains a "question upon which reasonable minds might differ," there can be no judicial interference with the legislative determination of policy. A zoning ordinance was sustained in *McCarthy vs. City of Manhattan Beach,* 41 Cal. 2d 879. Here the ordinance restricted the use of plaintiffs' oceanfront property to beach recreational purposes. Plaintiffs' contention was rejected that this ordinance, as applied to them, violated the due process and equal protection clause of both federal and state constitutions and constituted a taking of their property for public use without compensation. In *McCarthy* the ordinance was shown by the evidence to be part of a city-wide zoning plan, with plaintiffs' property falling in a zoning district limited to beach recreational uses. In upholding the constitutionality of the ordinance, the court relied upon established principles, stating: "Where substantial reason exists to support the determination of the city council in matters of opinion or policy affecting zoning plans, and the propriety of the districting classification is 'fairly debatable' in furtherance of the community development, courts will not substitute their judgment for that of the municipal authority." (*McCarthy vs. City of Manhattan Beach,* 41 Cal. 2d 879, 890.) In *McCarthy* as in *Clemons* the court follows the view that the fact that a property owner may suffer some financial detriment does not require invalidation of zoning legislation. Financial loss to a property owner resulting from zoning restrictions is considered to be an injury that is merely incidental to an appropriate exercise of the police power. "It is implicit in the theory of police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes

of public health, safety, morals and general welfare, and if there is no arbitrary and unreasonable application in the particular case." (*Wilkins vs. City of San Bernardino,* 29 Cal. 2d 332, 338.)

That a financial loss to a property owner is not fatal to the constitutionality of appropriate zoning ordinances is a principle applied even in cases where a zoning restriction may prevent the most valuable use of an owner's property. Thus *Consolidated Rock Products Co. vs. City of Los Angeles,* 57 Cal. 2d 515, upheld a zoning ordinance which prevented a rock and gravel operation on the plaintiffs' property, even though there was a finding that the property had great value if used for the extraction of rock and gravel, but very little value for other uses. In sustaining the constitutionality of the zoning ordinance in *Consolidated Rock Products* against the contention that this constituted a taking of private property for public use without compensation, the court again followed the principle that whenever reasonable minds might differ as to the necessity or propriety of a particular regulation or classification, the court must bow to the legislative determination and sustain the regulation. This rule of construction was considered appropriate even though the case was one in which there was only one valuable economic use for the property, and this use was prohibited entirely by the legislation.

In the case at bench, petitioner relies upon the case of *Pennsylvania Coal Co. vs. Mahon,* 260 U.S. 393. Here a municipal ordinance was declared unconstitutional which prohibited a property owner from subsurface mining which was the only economic use of the property. The property owner involved had purchased

the subsurface rights only and the seller of the subsurface rights had waived any claims for damage due to subsidence from mining.

In *Consolidated Rock Products* the plaintiff argued that *Pennsylvania Coal* supported the position that any ordinance which prohibited the only economic use available to the property was unconstitutional. The California Supreme Court answered this argument in part by stating that *Pennsylvania Coal* was decided before the principle of comprehensive zoning was constitutionally established in cases like *Euclid vs. Amber Realty Co., supra.* This argument, however, is not required. Even before *Pennsylvania Coal,* the United States Supreme Court had set forth a broad statement in favor of the constitutionality of legislation which may cause substantial financial hardship to individuals. This was done in *Hadachek vs. Sebastian,* 239 U.S. 400, 410, where the court said: "It is to be remembered that we are dealing with one of the most essential powers of the government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. (Citation) To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress; and if in its march private interests are in the way, they must yield to the good of the community."

In *Chicago B & Q R. Co. vs. Illinois ex rel. Grimwood,* 200 U.S. 561, a railroad company was required to sustain the burden of the entire cost of removing and

rebuilding a railway bridge made necessary by the proposed widening and deepening of a channel of a creek by a flood control district. In *Queenside Hills Realty Co. vs. Saxl,* 328 U.S. 80, a New York City ordinance was sustained which required the owners of lodging houses to install an automatic wet-pipe sprinkler system. The owner claimed that his lodging house had a market value of $25,000 and that compliance with the ordinance would cost him $7,500, with negligible benefits, as he already had a fireproof building. In refusing to consider this financial loss, Mr. Justice Douglas stated that "Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of public safety or welfare the owner is prohibited from using his property. (Citations) We are here dealing with a less drastic measure . . . The police power is one of the least limitable of governmental powers and in its operation often cuts down property rights."

In the case at bench petitioner points out that *Pennsylvania Coal* is not moribund, but is cited with approval by the United States Supreme Court in *Goldblatt vs. Town of Hempstead,* 369 U.S. 590. *Goldblatt* involved a town ordinance which prohibited excavating on land below the water table. The landowners involved had been excavating on their lot for sand and gravel before the ordinance was enacted and they had reached the water table. The ordinance which prohibited further excavations was held constitutional as being within the police power of the town as a safety measure, even though the ordinance completely prohibited a beneficial use to which the property had been primarily put. The court does not shrink from endorsing its earlier view that if the legislation is otherwise a valid exercise of

3

police powers, the fact that it deprives the property of its most beneficial use and causes the owner substantial pecuniary loss, does not render it unconstitutional.

The citation of *Pennsylvania Coal* by *Goldblatt*, without criticism, means merely that the United States Supreme Court is following the principle that governmental action, in the form of regulation, may be so onerous in a particular case as to constitute a taking of property which constitutionally requires compensation to the owner. That *Pennsylvania Coal* has this meaning and that each case must be decided upon its own factual situation are gained from *United States vs. Central Eureka Mining Co.*, 357 U.S. 155, in which the War Production Board in 1942 issued an order closing down operations of gold mines, intending thereby to divert mining equipment to more urgently needed industries and to divert skilled gold miners into more closely related war work. This order of the War Production Board was held not to be a taking of private property for a public use requiring compensation within the meaning of the Fifth Amendment.

Pennsylvania Coal was urged upon the court to require compensation to the gold mine owners. In rejecting this contention, the court stated that *Pennsylvania Coal* simply creates the rule that the issue as to whether a particular government restriction amounts to a constitutional taking of property is a question properly turning upon the particular circumstances of each case.

It thus appears clear that there is no set formula to determine where *regulation* within the police power ends and a *taking* under eminent domain begins. *Pennsylvania Coal* shows that an exercise of the police power

in form may in substance constitute an exercise of the right of eminent domain. There can be no quarrel with the view that when the police power passes beyond proper boundaries in its effect upon property rights, it then comes within the purview of the law of eminent domain and its exercise requires compensation. (*Barney & Grenn vs. Williams,* 155 Cal. 318; *Pacific Telephone, etc. Co. vs. Eshleman,* 166 Cal. 640; *House vs. L.A. County Flood Control District,* 25 Cal. 2d 384.) Although a comparison of the value of property before regulation and after regulation is relevant, it is by no means conclusive. Thus, in *Hadachek vs. Sebastian,* 239 U.S. 394, an ordinance prohibiting bricklaying within a residential district caused a diminution in the value of property from $800,000 to $60,000, and yet the ordinance was declared constitutional. It follows also that the form of the legislation, whether regulatory or not, can have little weight in determining the constitutionality of the enactment. As *Pennsylvania Coal* demonstrates, legislative action in the form of regulation can so diminish the value of property as to constitute a taking requiring compensation. Similar to *Pennsylvania Coal* is *United States vs. Kansas City Ins. Co.,* 339 U.S. 799, where the destruction of the agricultural value of an owner's farmland by the government maintaining the Mississippi River continuously at high water level through a dam was deemed a constitutional taking requiring compensation, and *United States vs. Causby,* 328 U.S. 256, in which an owner's farm as a chicken farm and the livability of its occupants were destroyed from noise and glaring lights at night of airplanes leaving and landing at an airport and this was considered a constitutional taking requiring compensation.

Zoning legislation in the classic sense may be considered as limited to restrictions upon the use of land by the owner. But in a broader sense zoning has become more comprehensive, and includes requirements that an owner permit his property to be used by a governmental entity for limited purposes. Dedication for street use required of land subdividers is an example of the broader concept of comprehensive zoning legislation. *Ayres vs. City Council of Los Angeles,* 34 Cal. 2d 31, upheld the imposition upon a subdivider of a condition requiring him to dedicate for street widening purposes a 10-foot strip abutting Sepulveda Boulevard. In *Ayres* it was contended that such a condition amounted to the taking of property for public use without compensation. The city ordinance which authorized the imposition of such a condition was considered a proper exercise of the police power and was not deemed to constitute a taking of property for public use without compensation. The court rejected the contention that since the use of the land for street widening purposes was contemplated in any event by the city, the dedication and use reservation requirements were unconstitutional as an exercise of the power of eminent domain. In rejecting this contention, the court stated at page 42: "A sufficient answer is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public."

Ayres points out that in evaluating the reasonableness of such a statute to accomplish its purposes, consideration is logically given to such factors as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective measures and the loss which the property owner will suffer from the imposition of the ordinance. In light of these factors, the evidence in *Ayres* supported the trial court finding that the creation and proposed uses of the subdivision would give rise to traffic and other conditions necessitating the widening of Sepulveda Boulevard; that the widening was necessary for, and would benefit the lot owners, and that the requirement was reasonably related to the protection of the public health, safety and general welfare. Required dedications for street widening purposes in subdivision developments have been upheld in other states. (*Ridgefield Land Co. vs. City of Detroit,* 241 Mich. 468; 217 N.W. 58; *Newton vs. American Sec. Co.,* 201 Ark. 943, 149 S.W. 2d 311.) That required dedication for street widening purposes causes a property owner to give up a portion of his property rights is obvious. But as in classic zoning restrictions, the fact that some hardship or financial loss will be experienced by an individual property owner is not fatal to constitutionality, as "every exercise of the police power is apt to affect adversely the property interests of somebody." (*Zahn vs. Board of Public Works,* 195 Cal. 477, 512.)

It is contended that the case at bench goes beyond comprehensive zoning, including the street dedication requirements of the subdivision cases, and hence the court decisions upholding general zoning restrictions and street dedication requirements of subdivisions do not

furnish authority for sustaining the type of ordinance involved here.

In analyzing the reasoning upon which zoning regulations and street dedication requirements against subdividers have been decided, it appears that there are no inherent differences between zoning ordinances and street dedication requirements for subdividers on the one hand, and the type of ordinance involved in the case at bench on the other, to dictate different constitutional results. As has been pointed out, *supra,* some zoning ordinances may be so onerous, arbitrary or unreasonable as to be declared unconstitutional. *Kissinger vs. City of Los Angeles,* 161 Cal. App. 2d 454, involved such an ordinance. There plaintiff's 12 lots near an airport were rezoned from R-3 to R-1. The evidence indicated that plaintiff's property zoned for R-3 usage had a market value of $114,000.00, but zoned for R-1 usage had a value of only $48,000.00. The vice of the ordinance was not so much in its effect upon the value of the property, as that it was deemed a spot zoning ordinance aimed specially at plaintiff's property, while leaving all similarly situated property subject to comprehensive zoning and zoned R-3.

In *Grisso vs. Board of Adjustment,* 61 Atl. 2d 167, the Supreme Court of New Jersey struck down an ordinance which provided for a future extension of a street which would occupy the whole of plaintiff's property. The plaintiff applied for a variance to the appropriate authorities and his application was denied because of the ordinance. The New Jersey Supreme Court said it was not within the police power of the governing body to plan a street across private property and then prevent the owner from making any use

of his property until the municipality was prepared to lay out the street. This was considered a confiscation of private property under the guise of a police regulation. Similar to *Grisso* is *Miller vs. City of Beaver Falls,* 82 Atl. 2d 34, in which the Pennsylvania court declared unconstitutional, as an unlawful taking of private property for public use without compensation, legislation which enabled a city to plot out ground for future parks and then provided that no landowner could recover compensation for any building constructed within lines of the park, and gave the city three years to decide whether to take the property for the allotted purpose. The legislation in both *Grisso* and *Miller* prohibited all beneficial use of the property by the property owner without any saving provision for hardship and without general applicability. *Grisso* and *Miller,* like *Kissinger,* are instances of zoning ordinances which are considered too onerous and unreasonable to be sustained. However, in *Metro Realty vs. County of El Dorado,* 22 A.C.A. 560, a somewhat similar ordinance to that involved in *Kissinger,* but with more general applicability, was sustained.

Metro Realty was a case in which plaintiff's tentative subdivision map was rejected because of a county temporary zoning ordinance which prevented subdivisions but permitted agricultural and recreational use in thirty-one potential reservoir sites for water conservation. The court upheld the ordinance and distinguished *Kissinger* because *Kissinger* was a permanent ordinance, whereas *Metro Realty* was a stopgap or incubation-period ordinance, and because plaintiff's property was not singled out for a spot zone treatment as in *Kissinger.* Although in *Metro Realty* the property owners suffered some loss, the court pointed out that

zoning ordinances frequently result in hardship to individuals who must bow to the common good and remain uncompensated. Thus, in *Miller vs. Board of Public Works,* 195 Cal. 477, the landowner was prevented from constructing a 4-family flat; in *Lockard vs. City of Los Angeles,* 33 Cal. 2d 453, the landowner was prevented from constructing a manufacturing plant; in *McCarthy vs. Manhattan Beach,* 41 Cal. 2d 879, the landowner had to leave his property for beach and recreational purposes; in *Consolidated Rock Products Co. vs. City of Los Angeles, supra,* the landowner was permanently forbidden to develop a rock quarry, the only valuable use to which his property could be put; and in *Marblehead Land Co. vs. City of Los Angeles,* 47 Fed. 2d 528, an ordinance prohibited property owners from drilling for oil on property zoned for residential use.

Even in eminent domain proceedings proper, all damage or loss to the property owner is not considered compensable. In *People vs. Ayon,* 54 Cal. 2d 217, the court recognized that although an abutting property owner has a compensable right to direct access to adjacent streets and to through traffic along the street, yet the value of property may be substantially diminished and no compensation paid by proper exercise of the police power in the regulation of traffic which may impede the convenience of ingress and egress, such as placing permanent dividing strips which deprive an abutter of direct access to the opposite side of the street, the designating of an entire street as a one-way street, or the diverting of traffic from one street to another. Such exercises of the police power in traffic regulation without compensation for property value loss "is simply a risk the property owner assumes when

he lives in modern society under modern traffic conditions". (*People vs. Ayon,* 54 Cal. 2d 217, 224.)

Growth in urban populations and motor vehicular traffic has led cities to seek ways and means of bringing about widening of existing streets to keep pace with this growth. In *Headley vs. City of Rochester,* 272 N.Y. 197, 5 N.E. 2d 198, a city ordinance adopted a master plan for new streets and for the widening of existing streets. The ordinance provided that no building permit would be issued for any building to be constructed within the bed of the street as proposed. A landowner whose property would be diminished in size because of this ordinance sought to have it declared unconstitutional. The state legislation which authorized such an ordinance provided that if land was not returning a fair return to the owner the appropriate zoning board of the city enacting such an ordinance could grant the owner permission to build on his land and within the mapped portion of the street to be widened. The New York Court of Appeals held that the Rochester city ordinance was a valid exercise of the police power. The landowner, who sued to have the ordinance declared unconstitutional, had no particular plans for building on his property and made no showing that he was adversely affected by the legislation.

An ordinance such as that involved in *Headley* is one type of ordinance designed to obtain a widening of existing streets which is short of an eminent domain proceeding. A somewhat similar ordinance is involved in *Symonds vs. Buklin,* 197 Fed. Supp. 682. *Symonds* involved the validity of a Maryland county zoning ordinance which provided that no building could

be erected within the lines of a proposed widening of a highway. The ordinance set up an administrative procedure whereby an owner could obtain a building permit if it were found that his property could not yield a reasonable return to him unless he could so build. An owner was denied a building permit both initially and under the administrative appeal procedure, and he brought suit in the United States district court to have the ordinance declared unconstitutional. The court denied plaintiff relief upon his failure to prove that he could not receive a reasonable return from a building constructed upon the unrestricted area of his property. The court relied upon *United States vs. Central Eureka Mining Co.*, 357 U.S. 155, which held that the issue as to whether a particular governmental restriction amounted to a constitutional taking turns upon the particular circumstances of each case, and which recognized that the mere fact that a regulation deprives the owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation.

Another type of ordinance designed to obtain a widening of existing streets without the compensation required by an eminent domain proceeding is that reflected by Section 12.37 of the Los Angeles Municipal Code involved in the case at bench. Is there any substantial difference between such an ordinance and that involved in *Headley* or in *Symonds*? In each type of ordinance the property owner is likely to suffer some financial loss or property loss. Can a valid distinction be made between an ordinance which causes financial loss to a property owner through the restrictive use of his property by zoning and a type of ordinance which imposes a financial loss upon the owner through a re-

quired dedication for street widening purposes of a portion of his property?

Whether the financial loss to the property owner occurs through an ordinance which takes the form of a zoning restriction, or which takes the form of a required dedication of a portion of his property for street widening, should not be material. Substance and not form must be the determining factor.

In *Pennsylvania Coal* Mr. Justice Brandeis dissented, and suggested a doctrine under which most of the cases can be reconciled. This doctrine is that the regulation or restriction imposed on property owners must be an appropriate means to a public end, and that the purpose of such a regulation or restriction imposed through the exercise of the police power does not become inappropriate as a means merely because the same end might be effected through the exercise of the power of eminent domain or otherwise at public expense. If the means used is for a public purpose, the means does not become inappropriate merely because the same result may be reached at public expense through the exercise of the right of eminent domain. *Ayres* demonstrates that legislation governing new subdivisions in requiring dedication for street widening purposes is not an inappropriate means under the police power. *Bringle vs. Board of Supervisors,* 54 Cal. 2d 86, indicates that the means used of a required dedication for street widening purposes under the police power is not to be limited to new subdivision legislation. In *Bringle,* pursuant to authorization given by a zoning ordinance to the Board of Supervisors to impose conditions on the granting of a zoning variance permit, the Board imposed a condition requiring the applicant to dedicate

to the county, without compensation, an easement 30 feet wide and 132 feet long for a right of way for street widening. Plaintiff sought to have the condition declared invalid. The trial court found that the activity for which the variance was granted would cause an additional traffic burden in front of plaintiff's property and concluded that the condition was reasonable.

In sustaining the condition imposed, the court relied upon *Ayres*. The court reasoned that one of the general purposes of a zoning ordinance is to provide for adequate streets and highways and a street adequate for the needs of an agricultural area may be inadequate if part of the area is to be used for another purpose, that the condition of a dedication for street widening purposes is reasonably related to increased traffic and other needs of the neighborhood. The required dedication of a portion of plaintiff's property for street widening purposes was thus held not to be an inappropriate means to achieve a public purpose, and hence did not constitute a taking of private property for a public purpose which would require compensation to the property owner.

In *Bringle* the court pointed out that plaintiff made no showing regarding the effect on traffic conditions of the use of his property in connection with his excavating business or that the need for widening the street was not related to the proposed use of the property, nor as to any master plan of the county. Is Section 12.37 of the Los Angeles Municipal Code distinguishable in principle from the doctrine laid down in *Ayres* or in *Bringle*? We think not. In the case at bench the evidence establishes that Section 12.37 of the Los Angeles Municipal Code is a part of the City's

comprehensive zoning plan and that the comprehensive zoning plan is a part of a master plan for orderly development of the growth of the city, which is made necessary by extensive population growth which has already taken place and which is continuing and projected into the future. To adequately take care of the population growth of the city, planned land use and development under comprehensive zoning regulations are essential. Because of the effect of land use and building development upon street traffic, a master plan for street and highway development is imperative. The evidence substantiates the need for major highways, which includes Alameda Street on which petitioner's property abuts, to have a roadway width of 100 feet. To attain the goal of street widening set for the various types of streets and highways, five different methods are being used. These are voluntary dedication, lot splitting, eminent domain proceedings, assessment districts and, during the last two years, proceedings under Section 12.37 of the Los Angeles Municipal Code.

There was testimony that if the only means available to the city to obtain the needed street widening for existing streets was through eminent domain, it would take 100 years to achieve the desired goals because of the lack of public funds available for this purpose. Petitioner objected to the admission of evidence tending to establish that Section 12.37 is needed to achieve the desired end of widening existing streets, on the ground that necessity for the ordinance is an irrelevant consideration on the issue of the constitutionality of the ordinance. The objection is not well taken. *Ayres* points out that consideration of the reasonableness of the imposed condition of dedication for street widening in subdivision legislation contemplates such

matters as the traffic needs of the area and the quality and kinds of land development for which the area is best adapted. *Bringle* emphasizes that increased traffic and other needs of the neighborhood become material in determining whether the required dedication for street widening purposes is an appropriate exercise of the police power instead of a taking of private property for which compensation is required under the principles of eminent domain.

Petitioner contends that the decision to widen Alameda Street as a major highway was made before petitioner sought to build upon its property and that the general needs of the city dictated the decision, and hence petitioner should not be required to bear a financial loss for the sake of the city. This same type of argument was made and rejected in *Ayres,* where the court pointed out that in a growing metropolitan area each additional subdivision adds to the traffic burden, and the fact that the street widening dedication would incidentally benefit the city as a whole is an irrelevant consideration. The same factors involved in requiring street widening dedications in new subdivisions and zoning variances apply with equal force to requiring street widening dedications on existing streets. In the case at bench, the petitioner's building was for general warehouse and storage purposes, consisting of 274,400 square feet in area, with a rail siding on one side and truck docks on the other. It was indicated that approximately 56 vehicles per day would service the building, with a capacity for service being even greater. Petitioner's building would generate additional truck traffic on Alameda Street. The evidence establishes that truck traffic has a greater impact on inter-

rupting the smooth flow of traffic than passenger cars. In addition to the street traffic generation resulting from petitioner's proposed building, the evidence shows that construction of buildings generally on lots abutting a street will generate increased traffic upon such street depending, of course, upon the type, size, and usage of such buildings.

If a zoning restriction or condition benefits both the property owner as well as the public in general, a reasonable basis is provided for imposition of the condition. In *City of Buena Park vs. Boyar,* 186 Cal. App. 2d 61, the court sustained the imposition of a condition on a subdivider to pay $50,000 to help the city build a drainage ditch that was for the general use of the lot owners in the subdivision as well as to meet city drainage needs. *Boyar* is distinguishable from *Kelber vs. City of Upland,* 155 Cal. App. 2d 631, where the condition imposed upon a subdivider to make payments to a park and school fund and a drainage fund was held illegal because the funds were not required to be used to satisfy *any* needs of the subdivision property owners. In *Ayres* the court speaks of a required dedication for street widening purposes as being valid since the dedication related to the safety and general welfare of the lot owners in the subdivision and "of the public". Accepting this principle of *Ayres,* the legality of Section 12.37 may not be attacked so long as the required street widening dedication relates to the police power goals as applied to both the needs and interests of the property owners involved and the city in general, without trying to equate precisely whether the benefit is greater to the one rather than to the other.

A relevant consideration in determining the validity of Section 12.37 is that the section does not provide for a required dedication of a portion of an owner's property under all circumstances when such owner wishes to build upon his property. The ordinance contains various limitations. One is that the maximum area to be dedicated may not exceed 25% of the area of a lot and in no event to reduce the lot below a width of 50 feet or an area of 5000 square feet. Another is that no dedication is required where the construction is to be a single family dwelling. These are reasonable provisions. It is obvious that a single family dwelling will not have the traffic generating possibilities of the large storage building to be erected by petitioner. Further, the ordinance provides for an appeal procedure whereby the Board of Public Works is given the authority to make modifications in the requirements, as the Board shall determine or require, in order to prevent any undue hardship under the facts of each individual case, with the over-all limitation that no modification shall be granted unless it is in conformity with the spirit and intent of Section 12.37.

Petitioner offered no evidence to establish that the dedication requirement would cause undue hardship to petitioner. Petitioner's property in the area between 7th and 8th Streets and Alameda and Wilson Streets consists of approximately 50 acres, including the portions required to be dedicated for street widening purposes under Section 12.37. Petitioner offered no evidence of the value of its property prior to the application of Section 12.37 or any reduced value resulting from the application of Section 12.37. In the absence of such evidence or of any showing of undue hardship,

petitioner does not make out a case that Section 12.37, as applied to petitioner, constitutes such a financial detriment to petitioner as to require a holding that the legislation constitutes a taking of petitioner's property for a public purpose, which requires compensation under the law of eminent domain.

Petitioner asserts that Section 12.37 constitutes an unlawful delegation of legislative authority, on the ground that there are inadequate standards to guide the administrative agency. The principles involved in what constitutes a valid or invalid delegation of authority are fairly clear. Legislative and administrative functions are separate and distinct. An administrative agency may not perform legislative acts. Hence a municipal or other legislative body may not delegate to an administrative agency, board or officer any legislative power or authority. If a municipal ordinance confers upon an administrative officer or board an uncontrolled discretion, it is deemed an unlawful delegation of legislative power. An uncontrolled discretion would permit administrative officers to act with caprice in carrying out the administration of the matters delegated to them.

But where the ordinance establishes adequate standards to guide the administrative officers in their conduct, the delegation of authority is not illegal. Some of the delegation of authority in *Agnew vs. City of Culver City*, 147 Cal. App. 2d 144, was held to be illegal because uncontrolled discretion was delegated. But this does not mean that the standards set forth in the ordinance or other legislative act must be of a strait-jacket kind. Discretion may be conferred upon administrative officers provided it is a guided discre-

tion as distinguished from an uncontrolled discretion. Thus, a power to determine whether an electric installation is dangerous to life or property has been held to constitute an adequate prescription of standards for the administrative officer. (*Gaylord vs. City of Pasadena,* 175 Cal. 433.) In *Mitchell vs. Morris,* 94 Cal. App. 2d 446, the phrase "adequate for purposes of access" was considered a sufficiently definite standard to uphold a city ordinance giving the planning commission the authority to determine when a lot had a street frontage adequate for purposes of access. The practicability of a situation has some bearing on determining how much discretion may be lawfully delegated to an administrative agency. (*New York vs. Van de Carr,* 199 U.S. 552.) Although the point was not specifically discussed, the ordinance upheld in *Bringle* involved a delegation of authority to impose such conditions on the granting of a zoning variance as would provide for the maintenance of the integrity and character of the neighborhood and the general purpose and intent of the ordinance. But in *Texas Consol. Theatres, Inc. vs. Pitillo,* 204 S.W. 2d 396, the Texas court overturned a zoning ordinance which delegated to an administrative board the authority to grant variances which would not be contrary to public interest, and where a literal enforcement of the ordinance would result in unnecessary hardship, and where the spirit of the ordinance would be maintained. The Texas court considered these standards as too general, vague and indefinite. This decision, however, appears to be contrary to the views of our appellate courts. In view of the delegations involved in *Bringle* and *Mitchell,* the standards set forth in Section 12.37 of "undue hard-

ship" and "in conformity with the spirit and intent of this section" must be held to be the delegation of a reasonable and guided discretion, not proscribed by our constitutional principle of separation of powers.

Petitioner also asserts that Section 12.37 is invalid under the doctrine that the State has occupied the field of street widening through eminent domain legislation which is set forth in Sections 1237 et seq. of the Code of Civil Procedure. But this contention begs the entire issue. If Section 12.37 of the Los Angeles Municipal Code involves an exercise of the right of eminent domain, then there is a "taking" of petitioner's property without compensation, which would be in violation of the due process and equal protection provisions of the State and Federal Constitutions. However, if the enactment is a proper exercise of the police power, there is no exercise of the right of eminent domain or "taking" of petitioner's property, and the constitutional and statutory provisions relating to the exercise of the right of eminent domain are not applicable at all.

An owner who seeks to construct a building on his property is in a different classification under Section 12.37 from the owner who does not seek to build. There can be no constitutional objection to Section 12.37 because there are property owners along Alameda Street who erected buildings prior to the enactment of Section 12.37. Such an owner is a passive spectator and, as such, will be entitled to compensation under the law of eminent domain whenever the city proceeds to widen the highway at the point his property abuts upon the highway and takes his property for such purposes. Such individuals, whose properties are

situated along major or secondary highways which need to be widened, are properly classified into a different category from property owners who now seek to construct buildings which will generate increased traffic on such highways and materially increase the need for wider streets and highways. It is the present and future building-erection activity of the property owner which substantially augments the need for street widening and justifies a regulation in the form of the imposition of a condition requiring the property owner to dedicate a portion of his property for street widening in order to obtain a permit to build. Failure of a city to act sooner so that all property owners erecting buildings would be in the same category is not a valid attack upon the legislation. The need for such legislation arose after land use began to create the problem. A landowner has no vested interest to "preclude development and fix a city forever in its primitive conditions" said the United States Supreme Court in *Hadachek vs. Sebastian,* 239 U.S. 400, 410.

There is undoubtedly a conflict between the public interest manifested through the exercise of the police power and the property interest of the individual manifested through the governmental exercise of the power of eminent domain. The decisions of our courts represent an attempt to give due consideration to both conflicting policies and to arrive at a just compromise between the two. As pointed out in *Bacich vs. Board of Control,* 23 Cal. 2d 343, 351: "In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police power where

compensation need not be paid. The line between those two concepts is far from clearly marked."

There are, and will continue to be, differences of opinion as to the proper line of demarcation. Some will agree with Mr. Justice Holmes when he said in *Pennsylvania Coal* that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Others, however, are in accord with the reasoning of the majority in *Ayres* that we must accept the "distinction between the exercise of the sovereign power of eminent domain and the noncompensatory nature of reasonable restrictions in respect to private interests when they must yield to the *good of the community.*"

A consideration of the evidence and of relevant federal and state authorities leads this court to conclude that Section 12.37 of the Los Angeles Municipal Code is an exercise of the noncompensatory police power rather than an exercise of the power of eminent domain, and that any financial loss to petitioner must yield to the good of the community.

Petitioner's request for a writ of mandate is denied. Section 12.37 of the Los Angeles Municipal Code is declared to be constitutional both on its face and as applied to petitioner. Respondents are to prepare findings and judgment in accordance with the views expressed herein.

Dated: August 27, 1964.

Bernard S. Jefferson
Judge of the Superior Court

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 22 1966
JOHN DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966
No. 797

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

MOTION TO DISMISS.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
CLAUDE E. HILKER,
Assistant City Attorney,
2102 City Hall,
Los Angeles, Calif. 90012,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

Statement of Facts 2

I.

The Judgment Appealed From Rests Upon an Adequate Non-Federal Basis 6

II.

The Appeal Does Not Present a Substantial Federal Question 9

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	Page
Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P. 2d 1	9
Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P. 2d 182	10
Brous v. Smith, 304 N.Y. 164, 106 N.E. 2d 503	10
Buck v. People of the State of California, 343 U.S. 99, 72 S. Ct. 502, 96 L. Ed. 775	8
Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P. 2d 342, app. dis., 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112	7
Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303	6, 9, 10, 12
Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130	10, 11, 12
Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348	9
Hammerstein v. Superior Court of California, 340 U.S. 622, 71 S. Ct. 521, 95 L. Ed. 586	8
Lawrence v. State Tax Commission, 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102	12
Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P. 2d 38, cert. den., 337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744	7
Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, app. dis., 273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889	7
Southern Pacific Company v. City of Los Angeles, et al., 242 A.C.A. 21, 51 Cal. Rptr. 197	2

Page

Sprols v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 6

Stembridge v. State of Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 8

Valley Steamship Co. v. Watawa, 244 U.S. 202, 37 S. Ct. 523, 61 L. Ed. 1084 9

Zahn v. Board of Public Works, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 ..... 7, 9

Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 8

Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 9

Statute

Los Angeles Municipal Code, Sec. 12.37 ..3, 4, 5, 7, 12

IN THE

Supreme Court of the United States

October Term, 1966
No. 797

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

MOTION TO DISMISS.

The Appellees City of Los Angeles, a municipal corporation, J. C. Monning, its Superintendent of Building, and Lyall A. Pardee, its City Engineer, hereby move to dismiss the appeal heretofore filed with this Honorable Court by Southern Pacific Company. Such motion is based upon the following grounds:

1. The judgment appealed from rests upon an adequate non-federal basis.

2. The appeal does not present a substantial federal question.

Appellant in its Statement of the Case contained within its Jurisdictional Statement omits mention of some of the key evidence and findings relied on by the lower courts while reiterating some of its own factual contentions made in and rejected by those courts. (Jurisdictional Statement, pp. 5-6.) It thus becomes necessary to more fully set forth the facts involved herein before we can properly discuss and elaborate upon each of our above mentioned grounds in support of our Motion to Dismiss.

Statement of Facts.

The facts involved in this case have heretofore been set forth by the California District Court of Appeal in its opinion (*Southern Pacific Company v. City of Los Angeles, et al.*, 242 A.C.A 21, 51 Cal. Rptr. 197; appellant's Jurisdictional Statement, Appendix "A") and by the trial court in its Memorandum Decision. [C. T. pp. 236-261; appellant's Jurisdictional Statement, Appendix "C".] The facts hereinafter set forth, unless otherwise noted, are recited within the opinion of the District Court of Appeal.

Appellant is the owner of some 50 acres of land in the industrial section of the City of Los Angeles bounded on its westerly side by Alameda Street, a major highway which is substandard in width where it adjoins appellant's property. In 1963 appellant desired to construct a warehouse occupying approximately 3½ acres of land and a total floor area of some 5 acres on a portion of such land after first relocating onto the southerly portion of such property its existing open lot "team track" operation involving some 2200 freight car deliveries and some 4400 truck loadings per year. [R. T. p. 37, line 12, to p. 39, line 6.] The proposed warehouse

could be utilized by some 20 railroad cars at a single time and had a capability of loading and unloading 48 trucks at one time. As the District Court of Appeal pointed out such warehouse "could be operated, if desired, by tenants on a 24-hour basis. If so used, more than 1,000 trucks would be utilized each day." (Jurisdictional Statement, Appendix "A", p. 13.)

When appellant in 1963 sought a building permit for such warehouse, such permit was refused by the City pursuant to Section 12.37 of the Los Angeles Municipal Code until such time as appellant dedicated (or the city otherwise acquired) the westerly 10 feet of its property for a distance of 850 feet along Alameda Street (approximately 1/5 of an acre) for public street purposes so as to bring the adjacent half of such highway up to its master planned width. It was subsequently agreed that such permit might issue and such construction proceed, with the required dedication to await the outcome of this lawsuit. (Jurisdictional Statement, p. 4.)

Section 12.37 of the Los Angeles Municipal Code as it read when this law suit was instituted in 1964 is set forth in the Clerk's Transcript, pages 29-37, and in Appendix "B" to the Jurisdictional Statement herein. Such section provides in essence that, with certain limited exceptions, no building or structure shall be erected or enlarged upon any lot in an R3 or less restrictive (multiple dwelling, commercial or manufacturing) zone abutting upon a major or secondary highway, unless the half of the highway located adjacent to such lot has been dedicated and improved to its master planned width. Then follow certain limitations upon and exceptions to such restriction so as to permit the

lesser use of such lands and a procedure by which a variance from the restrictions of the section can be procured or by which dedication can take place expeditiously if it is desired to put the land to its most *intensive* use and to build *immediately* rather than await the widening of such highway by some other means. Such provision is part of the Comprehensive Zoning Plan of the City of Los Angeles.

The District Court of Appeal in upholding the validity of Section 12.37 specifically recognized and commented upon the fact that the recent explosive population and industrial growth of the City of Los Angeles has been accompanied by an even *greater* proportionate increase in vehicles used and in highway deficiencies and congestion; that the progress of traffic is always slowed by the entry of trucks (such as would be generated by appellant's operation) into the traffic flow; that the widening of the substandard highway adjacent to appellant's property will not only benefit the overall traffic flow, but will benefit appellant's own operations and land value through increased accessibility. (Jurisdictional Statement, Appendix "A", pp. 12-14.)

Upon the completion of the trial of this matter the trial judge prepared an extremely thorough Memorandum of Decision (Jurisdictional Statement, Appendix "C") setting forth clear and sound answers to the many points raised by appellant in this law suit and specifically found and determined, amongst other things, that:

(a) Section 12.37 is part of the Comprehensive Zoning Plan and its limitations upon the use and development of land are comparable with other regulations within such plan. [C. T. p. 38, lines 5-9.]

(b) the city's extensive population growth has necessitated and made essential the planned and controlled use and development of land within the city including a master plan for highway development. [C. T. p. 38, lines 12-25.]

(c) the existing street system within the city is materially deficient and inadequate and such deficiency is increasing at an increasing rate due to the population explosion and increased motor vehicle registration and building construction. [C. T. p. 38, lines 28-32.]

(d) Section 12.37 is reasonably related to and necessary to effectuate the city's master plan of highways. [C. T. p. 39, lines 3-5.]

(e) the provisions of Section 12.37 benefit both the affected property and the general public. [C. T. p. 39, lines 5-8.]

(f) the construction of high density use buildings directly and materially affects the city's traffic and transportation facilities. [C. T. p. 39, lines 9-13.]

(g) the conditions imposed upon intensive land use and development by Section 12.37 are neither arbitrary nor unreasonable, are within the police power and "are matters upon which reasonable minds might differ." [C. T. p. 40, lines 2-9.]

(h) Section 12.37 does not deprive appellant or others of the entire use or economic benefit of their property [C. T. p. 40, lines 12-15], contains reasonable, not arbitrary, classifications [C. T. p. 40, lines 18-23], and provides adequate standards to guide the administration and enforcement thereof. [C. T. p. 40, lines 26-28.]

(i) appellant's warehouse will generate increased truck traffic on Alameda Street and will further congest traffic thereon by the addition of railroad lines to serve same. [C. T. p. 42, lines 2-5.]

(j) the dedication required of appellant as a condition to its immediate construction of its warehouse will not cause it undue hardship or financial loss. [C. T. p. 42, lines 12-14.]

With the foregoing facts and the actual findings and determinations of the lower courts in mind, let us now proceed to a consideration of the necessity for review by this Honorable Court.

I.

The Judgment Appealed From Rests Upon an Adequate Non-Federal Basis.

The well-settled law in this country is that the validity of legislation must be determined by the application to the facts of the so-called "reasonable minds" test. This was stated by the United States Supreme Court in the early and leading zoning case of *Euclid v. Ambler Realty Company*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, at page 388:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

In *Sproles v. Binford*, 286 U.S. 374 (52 S. Ct. 581, 76 L. Ed. 1167), it was stated at page 388 that:

> ". . . debatable questions as to reasonableness are not for the courts but for the legislature."

Similar language was used in *Zahn v. Board of Public Works,* 274 U.S. 325, 328, 47 S. Ct. 594, 71 L. Ed. 1074. This principle has been echoed and followed by state courts throughout the nation in hundreds of zoning decisions since those early declarations, including the California courts. (*Lockard v. City of Los Angeles,* 33 Cal. 2d 453, 461, 202 P. 2d 38, Petition for Writ of Certiorari denied — 337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Miller v. Board of Public Works,* 195 Cal. 477, 490, 234 Pac. 381, appeal dismissed — 273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889; *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal. 2d 515, 522, 523, 370 P. 2d 342, appeal dismissed — 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112).

Whether the facts in the present case were such that reasonable minds might differ as to the necessity and propriety and reasonableness of the enactment of Section 12.37 and its application to the subject property was a factual determination which was presented to, thoroughly argued before and specifically considered and ruled upon by the state courts in the instant case and was, we submit, determinative of the case.

Without going into any greater detail than hereinabove set forth as to the extensive evidence presented to the trial court and the findings of fact of the trial court based thereon, showing the necessity for and reasonableness of Section 12.37 (reference is made to pages 35-41 of respondents' Answer to Petition for Hearing in the California Supreme Court for a summation of such evidence), suffice it to say that the trial court specifically found, based upon such evidence, that

> "The conditions placed upon land use and development in R3 and less restrictive zones in the

> City of Los Angeles by Section 12.37 of the Los Angeles Municipal Code bear a substantial relationship to the accomplishment of a proper public purpose within the police power, and are not arbitrary or unreasonable. The means selected by the City's legislative body by the formulation and adoption of Section 12.37 are matters upon which reasonable minds might differ." [C. T. p. 40, lines 2-9.]

Similarly the District Court of Appeal, upon reviewing this matter, declared (Jurisdictional Statement, Appendix "A", p. 12.)

> ". . . the determination below must be sustained if the necessity and propriety of the legislative action is one upon which reasonable minds may differ (citation). Governed by such rule, and upon an examination of the evidence presented, we have no hesitancy in finding that all the relevant circumstances justified the legislation here challenged."

The law is clear that the United States Supreme Court will not take jurisdiction of a matter where the judgment of the state court could be supported upon an adequate non-federal ground. (*Stembridge v. State of Georgia,* 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Buck v. People of the State of California,* 343 U.S. 99, 72 S. Ct. 502, 96 L. Ed. 775; *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954; *Hammerstein v. Superior Court of California,* 340 U.S. 622, 71 S. Ct. 521, 95 L. Ed. 586.) It is submitted that the factual determinations of the lower courts herein provide an adequate non-federal ground to support the

judgment of the California District Court of Appeal and that this Honorable Court should therefore refuse jurisdiction of and dismiss this appeal.

II.

The Appeal Does Not Present a Substantial Federal Question.

The determination of this Honorable Court in the case of *Zucht v. King,* 260 U.S. 174 (43 S. Ct. 24, 67 L. Ed. 194) sets forth the law underlying this point in language surprisingly applicable to the facts of this case. In dismissing the writ of error there involved the court at pages 176 and 177 first pointed out how prior decisions had upheld the principles therein being challenged and then concluded:

> "In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error."

To the same effect see also *Valley Steamship Co. v. Wattawa,* 244 U.S. 202, 37 S. Ct. 523, 61 L. Ed. 1084.

It is submitted that the law is now clear and firmly established that property has not been "taken," as appellant contends herein, by the application of reasonable zoning regulations thereto or by the denial of building permits for a use not in conformity with such zoning. (*Euclid v. Ambler Realty Co., supra; Zahn v. Board of Public Works, supra; Hadacheck v. Sebastian,* 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348.) Likewise it has been held that property has not been "taken" when, as a condition to the approval of a subdivision, dedication is required for street purposes (*Ayres v. City Council of Los Angeles,* 34 Cal. 2d 31, 207 P. 2d 1) or for

park purposes (*Billings Properties, Inc. v. Yellowstone County,* 144 Mont. 25, 394 P. 2d 182) or when, as a condition to the issuance of building permits, proper access (and therefore invariably street dedication) is required. (*Brous v. Smith,* 304 N.Y. 164, 106 N.E. 2d 503.) The propriety and validity of legislation is based upon the "reasonable minds" test. (Point I, above.) If an ordinance is otherwise a valid exercise of the police power, the fact that it deprives property of its most beneficial use does not render it unconstitutional. (*Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130.)

Probably the most far-sighted and comprehensive statement in this entire field was uttered by this court in the landmark case of *Euclid v. Ambler Realty Co., supra,* where the court stated at pages 386 and 387 of 272 U.S.:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago; probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no

inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

"The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."

It is submitted that the above declaration of this court made 40 years ago could as well have been made today. The basic rule for determining the validity of police power enactments was recently reiterated by this court in the case of *Goldblatt v. Town of Hempstead, supra,* wherein it was stated at page 594 of 369 U.S.:

"The classic statement of the rule in *Lawton v. Steele,* 152 U.S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499 (1894), is still valid today:

'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require

such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'"

It is submitted that the holdings of the lower courts herein as to the validity of Section 12.37 fall squarely within the guidelines of the *Euclid* and *Goldblatt* cases and, together with the presumption favoring the validity of legislative enactments (*Lawrence v. State Tax Commission,* 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102) fully support such holdings and negate the existence of any remaining substantial federal question.

With respect to appellant's incidental challenge to Section 12.37 based upon alleged lack of uniformity and improper classification and improper delegation of legislative discretion, reference is made to the holdings of the lower courts herein (Jurisdictional Statement, Appendix "A", pp. 14-17; Appendix "C", pp. 51-54) for a full answer to such contentions.

Conclusion.

For each and every of the reasons set forth above it is respectfully submitted that the within appeal to this Honorable Court should be dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

CLAUDE E. HILKER,
Assistant City Attorney,

Attorneys for Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 797

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,
vs.
CITY OF LOS ANGELES, a Municipal Corporation, J. C. MONNING, General Manager of the Building and Safety Department of the City of Los Angeles; LYALL A. PARDEE, City Engineer of the City of Los Angeles; and DOE I through DOE XX, inclusive,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

The appellee argues that this appeal should be dismissed first, because the judgment rests upon an adequate state ground and second, because the appeal does not present a substantial federal question. It is submitted by appellant

that neither of said reasons is applicable to the enactment sustained by the judgment in question.

The "reasonable minds" test is raised by the appellee in support of its first point in which it is claimed that the lower court judgment rests upon an adequate non-federal basis. It cannot be denied that where the principal point in question is the validity of legislative classification (as in the case of *Euclid v. Ambler Realty Company,* 272 U.S. 365 quoted on page 6 of the Motion to Dismiss) or is the reasonableness of legislative action, then debatable questions as to reasonableness should be for the legislature to decide and not for the courts. However, where as in this case the legislation clearly violates a right guaranteed by the Constitution this "reasonable minds" tests cannot sustain the police power enactment. In 16 C.J.S. Constitutional Law, §196, p. 946 it is stated:

"The exercise of the police power is under the control of the principles of constitutional law, and the police power must at all times be exercised with scrupulous regard for the constitutionally guaranteed rights." See also *Duckworth v. James,* C.A. Va., 267 Fed. 2d 224; cert. den. 361 U.S. 835; *Cooper v. Aaron,* 358 U.S. 1, 16; and *Buchanon v. Warley,* 245 U.S. 60, 81, stating at p. 74: ". . . it is equally well established that the police power broad as it is cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution"; Also see *Panhandle v. Highway Commission,* 294 US 613, 622.

Aside from any attack on the judgment sustaining the ordinance in question on the basis of unreasonable classification or as being invalid under the particular facts involved, it is submitted that the ordinance is invalid on its face as an unconstitutional taking of property without compensation and cannot therefore be sustained on any non-federal basis. In trying to justify the ordinance in ques-

tion, reliance has been placed upon the particular facts which indicate the portion of the property taken is small compared to the remaining holdings of the appellant. The inherent unfairness involved in sustaining a statute on this basis is made obvious by considering that nearly all other persons to whom the ordinance will apply will have much smaller holdings and they will sustain greater proportionate reduction of their property, but these persons who are unable to attack the ordinance for economic or other reason will be bound by the decision in this case. In addition "(I)t is the character of the invasion, not the amount of the damage resulting from it . . . that determines the question whether it is a taking." *Causby v. U.S.*, 328 U.S. 256, 266; *United States v. Cress*, 243 U.S. 316; and *R. J. Widen Company v. United States*, 357 F.2d 988, 993.

The appellee contends there is no substantial federal question presented because there is no taking of property but merely a zoning regulation permissible under the zoning power which is part of the police power. No attempt is made here to invalidate comprehensive zoning regulation and it is submitted that a reversal of the judgment herein would not have this result. However, what is requested is that the court take a close look at what the city has done in this case under the guise of zoning and determine whether this is a taking of property without compensation as required by the Fourteenth Amendment.

Zoning is basically a regulation of land use, prohibiting certain uses and allowing others. Such was the type of regulation found in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 relied on by the appellee. It restricts the uses to which certain land may be put, but still allows some use to the owner who retains control of his land. Compare this to the case now before this Honorable Court, where the owner loses control of his land and it is used by the general public for public purposes. It can hardly be denied that this

is more than a mere regulation of land use and is in effect a confiscatory taking of private property for public use without the provision for compensation required by the Constitution.

Except as hereinafter mentioned, all of the other cases cited by appellee along with the Ambler Realty Company case (272 U.S. 365) are clearly zoning regulation cases and therefore no more applicable to the instant case than is the Ambler Realty Co. Case. The only other cases are the Ayres (34 Cal. 2d 31), Billings Properties (144 Mont. 25) and Brous (304 N.Y. 164) cases cited on pages 9-10 of the Motion to Dismiss. The rule of these cases involving subdivisions was made necessary by the early subdivision abuses by land developers in this country which involved land fraud and the creation of new neighborhoods with built-in inadequate facilities. In these cases the developer is required to provide facilities made necessary by the proposed development. See the case of *Pioneer Trust & Sav. v. Mount Prospect,* 22 Ill. 2d 375, 176 NE 2d 799, which discusses the Ayres Case (34 Cal. 2d 31) and in referring to it on p. 380 of 22 Ill. 2d states: "(It) indicates that the Municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the Community." See also *Exchange Nat. Bank v. Cook County,* 6 Ill. 2d 419, 129 NE 2d 1, 51 ALR 2d 312 (". . . and defendant county's contention that the questioned application of the ordinance could be justified as a measure to cut down any further increase in traffic on this arterial street in question was rejected. Although complainants proposed to sell the property to one intending to maintain a trucking terminal thereon, the court said that, even so, the increased traffic which might be attributable to such use was insignificant in view of the tremendous volume of

traffic already using the street on which the property fronted." 51 ALR 2d 312). The application of the foregoing to the instant case is clear, since the need for widening the street in question is obviously caused by the general growth of the city (see items (b) and (c) on p. 5 of Motion to Dismiss) and not by the proposed improvement.

Since the availability of alternatives has some bearing upon judicial review of legislative action, it is submitted that obvious and clearly constitutional alternatives to the ordinance in question are available to appellee such as general taxation, vehicle or gasoline taxes.

It is therefore submitted that the case cannot be dismissed on non-federal grounds and since the questions are substantial Probable Jurisdiction should be noted.

Respectfully submitted,

RANDOLPH KARR,
ALAN L. FREEDMAN,
Attorneys for Appellant.